Although most American courts have followed this so-called "modern doctrine of equity,"[2] when they have come to apply it to cases where the trustee is a bank which has mingled the trust money with its own assets and then become insolvent, the results have been diverse. They seem to fall into three groups. (1) Some allow the *cestui* to follow his money only when he can show that the cash assets actually received by the assignee included the amount of his trust money.[3] (2) Others enforce the trust whenever it can be shown that its proceeds went into the cash assets of the insolvent estate, irrespective of subsequent transactions, or the amount which actually went to the assignee.[4] (3) Still others impose a trust upon the general assets, not merely the cash, upon proof that the trust property went to enrich the estate.[5]

This last rule obviously is not supported by either principle of Knatchbull *v.* Hallet. The proceeds have never even gone into a definite fund. It is often unjust, too, for when the trust money is used in paying debts, those debts are paid in full, with the result that some creditors are preferred at the expense of others. The second rule, on the other hand, seems to be supported by both the English principles. The trust money has been traced into a definite fund, and subsequent dealing with that fund ought not to affect the trust property, according to the presumption there set forth, that a trustee will deal first with his own property. But although in that case such a presumption was justified, in the case of a bank, where both funds are grouped together as assets, and the bank expects to use them indiscriminately in the course of business, any such presumption of intention is contrary to the facts.[6] The second principle expounded in Knatchbull *v.* Hallett cannot apply to any of these cases, so those American courts which follow the first rule above laid down seem to be justified. In the case of a bank the *cestui* should be allowed to recover only when he can trace the proceeds of the trust into the funds actually received by the assignee. This is the result recently reached in a Georgia decision, where the funds coming to the assignee were less than the amount of the trust. *G. Ober & Sons Co.* v. *Cochran*, 45 S. E. Rep. 382. As soon as the course of business has so changed the character or amount of the assets that they can no longer fairly be said to contain the trust funds, the *cestui's* rights to follow the *res* should be lost.

ELECTION OF REMEDY AGAINST AGENT OR UNDISCLOSED PRINCIPAL. — It is well established that one who deals with the agent of an undisclosed principal has, upon the discovery of the relation, two remedies at his disposal.[1] First, upon the ground that the contract is in reality that of the principal and not intended to bind the agent, he may recover from the principal. Second, by insisting that the contract was made by the agent as an independent party, he may hold the agent. In most jurisdictions, he may not only begin his action against either,[2] but he is not thereby precluded

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[2] Boone, etc., Bk. *v.* Latimer, 67 Fed. Rep. 27. *Contra*, Portland, etc., Co. *v.* Locke, 73 Me. 370.
[3] Spokane County *v.* First National Bk., 68 Fed. Rep. 979.
[4] Peak *v.* Ellicott, 30 Kan. 156; Continental Bank *v.* Weems, 69 Tex. 489.
[5] Davenport Plow Co. *v.* Lamp, 80 Ia. 722; Harrison *v.* Smith, 83 Mo. 210
[6] Phila., etc., Bk. *v.* Dowd, 38 Fed. Rep. 172.

[1] Pope *v.* Meadow Springs Distilling Co., 20 Fed. Rep. 35.
[2] Cobb *v.* Knapp, 71 N. Y. 348.

from suing the other unless he prosecutes it to final judgment against one.[3]

The courts appeal in these cases to the doctrine of election of remedies, which requires that wherever, for the same cause of action, a plaintiff is given two methods of redress based upon inconsistent theories, he be compelled to elect one and waive the other.[4] In designating judgment as the point at which election takes place they have, however, made a faulty application of the principle. Whether a person has made an election is a question of fact. By reason and by authority in other lines of cases, such an unequivocal act as commencing suit would seem to be conclusive proof of a binding election.[5] Moreover, if a plaintiff's act in prosecuting a suit to within a step of judgment is not an election, it is difficult to see how the act of the court in pronouncing judgment can be more decisive. It is submitted, therefore, that these cases may be reconciled on the ground that the courts while professedly applying the doctrine of election have gone upon a theory of merger, namely, that the plaintiff has but one right of action which he may pursue against either principal or agent until it is drowned in a judgment.[6]

The doctrine of election of remedies, however, seems to have been correctly applied in a case recently decided by the United States Circuit Court of Appeals for the District of Indiana. *Barrel* v. *Newby*, 36 Chic. Legal News 172. The defendant, when sued as after discovered principal, pleaded that the plaintiffs, with full knowledge of the facts, had begun and were continuing a suit at law against the agent. The court, holding that by the suit against the agent the plaintiff had made his election, overruled a demurrer to the plea. The case is extremely interesting since it is probably the first which has reached this result. Yet it is a logical consequence, if the doctrine of election is to apply.

Whether the plaintiff should on principle be put to his election, is a question somewhat in dispute. At least one jurisdiction has held that inasmuch as the agent is originally bound by the contract he can never be released until the obligation is discharged.[7] Some cases have even suggested the analogy of joint tort-feasors. On the other hand, it is impossible, as a matter of truth, to say that the contract was made upon the joint responsibility of agent and principal, for the plaintiff entered into it with no expectation of charging any one but the agent. Furthermore, when he sues one party as solely responsible, he negatives the liability of the other. Granting the correctness of the rule which gives such a plaintiff a direct right of action against either principal or agent, it would seem that the decision is correct in compelling him to elect.

RESTRICTIVE AGREEMENTS AS TO CHATTELS. — The modern tendency towards monopoly has found expression in attempts by manufacturers to maintain minimum retail prices for the sale of their goods. The manufacturer may effectively bind the wholesaler by a direct restrictive agreement; and an attempt is now frequently made to affect likewise the retailer by affixing printed labels to the goods, thereby charging all subsequent transferees with notice of the conditions under which they were originally

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[3] Sessions *v.* Block, 40 Mo. App. 569.
[4] See Thompson *v.* Howard, 31 Mich. 309, 312.
[5] Moller *v.* Tuska, 87 N. Y. 166.
[6] See 2 Bl. on Judg. § 674.
[7] Beymer *v.* Bonsall, 79 Pa. St. 293.